The Central Law Journal.

SAINT LOUIS, OCTOBER 4, 1878.

CURRENT TOPICS.

In *People v. Collins*, 2 P. C. L. J. 62, recently decided by the Supreme Court of California, the defendant had been convicted of burglary under the following circumstances. It appeared that he had requested one P to enter a certain building in the night time and to steal therefrom a sum of money, which he knew to be concealed there, the money, when stolen, to be divided between them. Instead of accepting and acting upon this proposal, P immediately informed the sheriff of it, who, after consultation with the district attorney, advised P to pretend to the defendant that he accepted the proposition and would carry out the enterprise. It was, therefore, agreed between P and the sheriff that when the money was taken it should be marked with acid so that it could be identified; and that when the money was delivered to the defendant a signal should be given by P to enable the sheriff to arrest the defendant with the money in his possession. This programme, as agreed upon by P and the sheriff, was carried into effect; P entered the building, secured the money, marked it with acid, delivered a part of it to the defendant, gave the signal as agreed upon, and the sheriff thereupon arrested the defendant with the money in his possession. The court below instructed the jury that if it was agreed between P and the defendant that the former should enter the building and steal the money, to be divided between them, and if in pursuance of the agreement, P did enter the building and take the money and divide it with the defendant, he was guilty of burglary, and the jury should so find "without regard as to the part taken in the offense by the witness P, or as to the motives or intentions of said P." On appeal this was held error, and the conviction reversed. "If P entered the building," said the court, "and took the money with no intention to steal it, but only in pursuance of a previously arranged plan between him and the sheriff, intended solely to entrap the defendant into the apparent commission of a crime, it is clear that no burglary was committed, there being no felonious intent in entering the building, or taking the money. If the act of entering amounted to burglary the sheriff, who counseled and advised it, was privy to the offense, but no one would seriously contend, on the foregoing facts, that the sheriff was guilty of burglary."

THE Illinois statute regulating the sale of railroad tickets has been declared constitutional by two of the circuit judges of that state. The statute which was passed in April, 1875, and is entitled "An act to prevent frauds upon travelers and owners of railroads, etc.," makes the sale, transfer or barter for a consideration of any railroad or steamboat ticket or check, by any person other than the agents of the company appointed for that purpose, an illegal act, subject to fine or imprisonment. In *People v. Walser*, 11 Ch. L. N. 12, the defendant was indicted under this act, in the Criminal Court of Cook county. A motion was made to quash the indictment, on the ground that the act was not within the scope of the police power of the state, but was an unwarrantable restriction upon the rights of private property, and, therefore, unconstitutional, which was overruled. MCALLISTER J. MOORE, J., concurring, after discussing at length the power of the legislature to regulate the business of common carriers, says: "Nothing can be clearer than that, in this state, railroad companies, so far, at least, as concerns the safety, comfort and convenience of passengers, are proper subjects of the police power. Of this there can be no question. If the business itself be subject to the police power, then so must all its incidents and accessories be subject to it. All experience teaches that the necessities of the business require the issuing and use of tickets. They are as necessary to the convenience of both traveler and carrier as baggage-checks or waybills in case of freight. The business and all its common incidents being proper subjects of the police power, then it follows from settled principles that the nature and character of the police regulations must be determined by the legislative, and not the judicial, branch of the government. After giving this matter much consideration, we are of the opinion that the act in question, being a matter of mere police

regulation of a public business, is constitutional and valid. There may arise cases where the contract for carriage was made in another state, which constitutional principles would prevent falling within the range of this act, but that is no ground for holding the act void as to all cases." It follows from this that the business of "ticket scalpers" is as unlawful in Illinois as is liquor selling in Maine or gambling in Massachusetts.

AMONG the rulings and oral opinions in the United States Circuit Court at St. Louis, last week, are the following:—In *Goss v. Chamber of Commerce Association*, a demurrer was filed to the petition, and after argument, DILLON, J., being of opinion that the defense sought to be set up under the demurrer did not fairly arise under it, advised the defendants' counsel to plead their defense specially, and bring it up in that way. *McKeighan*, for the defendant: "That will oblige us to confess the making of this contract, which we allege to be founded in an unlawful consideration and void." DILLON, J.: "You have evidently acquired a curious idea of pleading in this state." *McKeighan:* "We have acquired it from our Supreme Court." DILLON, J.: "The rule in this court is that you may file your general denial, and also your special defense; and if your special defense fails, this will not prejudice any defense you may properly make under your general denial."—In *Eisenmeyer v. Yaeger*, the question was distinctly presented by demurrer, whether the naked fact that a creditor has signed a consent to the discharge of a bankrupt from a debt created through fraud, and hence not dischargeable under the terms of the bankrupt act, will bar a subsequent action by the creditor upon such debt. The question appears never to have been decided in this country. The court, DILLON, J., giving the opinion orally, held that, in the absence of an allegation that at the time he consented to the discharge he did not know of the fraud, the consent to the discharge concluded him from subsequently suing the bankrupt on a cause of action, which had been filed as a claim in the Court of Bankruptcy, and on which he had taken a dividend. "As the law then stood, the bankrupt could not have been discharged without the consent of the plaintiff. His action in the premises may be presumed to have influenced the action of other creditors, perhaps to their prejudice, and to have injuriously affected their rights. Under these circumstances, our judgment is that the plaintiff can not, after having brought about a discharge of the bankrupt by his voluntary act, be heard to impeach that discharge on the ground of fraud, unless he can show that at the time he gave such consent he did not know that the debt was created by fraud." The demurrer was sustained with leave to amend the petition by charging such fact.—*Fleming v. McLean*, related to the law of costs. The case, a suit in equity, had proceeded to a final decree in this court, and had been appealed to the Supreme Court, where the decree had been modified, and an order made that the defendant should pay the costs of the court below, and the complainant, who had appealed, the costs of the Supreme Court. The complainant, in perfecting his appeal, had paid to the clerk the costs of the transcript, amounting to a considerable sum, and he now moved, under the order of the Supreme Court, to retax these costs against the defendant, contending that they were a part of the costs of the court below. But the court, TREAT, J., giving the opinion, DILLON, J., concurring, denied the motion. When an appeal is granted, the cause, in contemplation of law, has passed out of this court and into the Supreme Court, and costs expended in perfecting an appeal are to be deemed costs of that court and not of this court.

THE SUABILITY OF COUNTIES IN THE NATIONAL COURTS.

The question whether counties are liable to suit in the national courts has several times arisen. In McCoy v. Washington County, 7 Am. Law Reg 193, a suit on railway aid bonds, which was tried before Mr. Justice Grier, at circuit in the Western District of Pennsylvania, in 1859, it was contended that the county being merely a subordinate political division of the State of Pennsylvania, was not a citizen of that state within the meaning of the Constitution or the act of Congress, and, therefore, not suable in that court. To this Mr. Justice Grier answered: "Though the metaphysical entity called a corporation may not be physically a citizen, yet the law is well settled that it may sue and be sued in the

courts of the United States, because it is but the name under which a number of persons, corporators and citizens, may sue and be sued. In deciding the question of jurisdiction, the courts look behind the name to find who are the real parties in interest. In this case the parties to be bound by the judgment are the people of Washington county. That defendant is a municipal corporation, and not a private one, only furnishes a stronger reason why a citizen of another state should have his remedy in this court, and not in a county where the parties against whom the remedy is sought would compose the court and jury to decide their own case. The point is therefore overruled."

The same point is made in Lyell v. Supervisors of Lapeer County, 6 McLean, 446, which was an action brought by a British subject on a warrant or treasury order of one of the counties of Michigan, and tried before Mr. Justice McLean, at circuit in 1855. The question was dismissed by that able judge in the following words: "A county can not claim the immunity of not being sued under the eleventh section of the Constitution. If every county could throw itself on its sovereignty, and hold at defiance the judicial power of the Union, we should have in this country more sovereignty than law."

In 1868 the question came before the Supreme Court of the United States, in Cowles v. Mercer County, 7 Wall. 118, under a statute of Illinois, which recited in one section that "each county established in the state shall be a body politic and corporate, by the name and style of 'The County of ——;' and by that name may sue and be sued, plead and be impleaded, defend and be defended against in any court of record, either in law or equity, or other place where justice shall be administered;" and, in another section, that "all actions, local or transitory, against any county, may be commenced and prosecuted to final judgment and execution *in the circuit court of the county against which the action is brought.*" Rev. Stat. Ill 1845, ch. 27, §§ 1, 18. The Supreme Court of Illinois had decided that a county could neither sue nor be sued at common law, independently of legislative provisions, and had construed the foregoing sections of their statute as excluding the right to sue any county elsewhere than in the circuit court of the county sued. Schuyler Co. v. Mercer Co., 4 Gilman, 20; Rock Island County v. Steele, 31 Ill. 544; Randolph County v. Ralls, 18 Ill. 30. But that court had never decided that a county of the state was exempt from being sued in the national courts. The action before the Supreme Court of the United States was in form against the Board of Supervisors of Mercer County. This board was a corporation, created such by the laws of the State of Illinois. The force of the case seems to embrace a ruling of these two points: 1. That such corporation may be sued in the national courts; 2. That the county, whose political agent the corporation is, may be so sued. In giving judgment Chief Justice Chase said: "It has never been doubted that a corporation, all the members of which reside in the state creating it, is liable to suit upon its contracts by the citizens of other states; but it was for many years much controverted whether an allegation in a declaration that a corporate defendant was incorporated by a state other than that of the plaintiff, and established within the limits, was a sufficient averment of jurisdiction. And in all cases, prior to 1844, it was held necessary to aver the requisite citizenship of the corporators. Then the whole question underwent a thorough re-examination in the case of Louisville, Cincinnati and Charleston Railroad Company v. Letson, 2 Howard, 497; and it was held that a corporation, created by the laws of a state, and having its place of business within that state, must, for the purpose of suit, be regarded as a citizen within the meaning of the Constitution, giving jurisdiction founded upon citizenship. This decision has been since reaffirmed, and must now be taken as the settled construction of the Constitution. In the case before us the corporators are all citizens of Illinois, and the corporation is liable to suit within the narrowest construction of the Constitution. But it was argued that counties in Illinois, by the law of their organization, were exempted from suit elsewhere than in the circuit court of the county. And this seems to be the construction given to the statutes concerning counties by the Supreme Court of Illinois. But that court has never decided that a county in Illinois is exempted from liability to suit in national courts. It is unnecessary, therefore, to consider what would be the effect of such a decision. It is enough for this case that we find the board of super-

visors to be a corporation authorized to contract for the county. The power to contract with citizens of other states implies liability to suit by citizens of other states, and no statute limitation of suability can defeat a jurisdiction given by the Constitution."

This question has been again raised at the present term of the Circuit Court of the United States, for the Eastern District of Missouri, before DILLON and TREAT, JJ., in the case of *McPike v. Lincoln County*, and other cases.

Mr. Cunningham, for the defendant, filed a spec ial plea to the jurisdicion, alleging that "defendant is a political division of the state of Missouri, without other powers or obligations than may have been imposed upon it by law, and that, by all laws now or heretofore in force in the State of Missouri, a suit against defendant can only be had and maintained in the circuit court in the State of Missouri, in and for said county of Lincoln." The only statute of Missouri relating to the jurisdiction in which counties may be sued, reads as follows: "All actions, local or transitory, against any county, may be commenced and prosecuted to final judgment in the circuit court of the county against which the action is brought." 1 Wag. Stat., p. 408, § 4. There is nothing in the statutes of Missouri like the provisions above quoted from the statutes of Illinois declaring the counties bodies corporate and politic, with the general power of suing and being sued as a natural person. In the absence of such provisions, the Supreme Court of Missouri has decided that the counties of Missouri have not the powers of corporations in general, but that they are merely *quasi* corporations, political subdivisions of the state, acting in subordination and auxiliary to the state government. Ray Co. v. Bently, 49 Mo. 242; Han. & St. Jo. R. Co. v. Marion Co., 36 Mo. 303; State v. St. Louis Co. Court, 34 Mo. 546; Barton Co. v. Walser, 47 Mo. 189.

In support of this demurrer, *Mr. Cunningham* contended that the laws of Missouri have never declared a county a body corporate, but that the statutes in force when the bonds were issued merely divided the state into 114 subdivisions, designated as counties by certain names and boundaries; that some portions of the state, notably a strip of land nine miles wide, adjoining Worth County, had, until recently, never been organized into any county; that the only power of counties to make contracts provided that counties may appoint an agent to make any contract on behalf of such county for erecting any county building, or for any other purpose authorized by law; that the contract of such agent, duly executed on behalf of such county, shall bind such county; that the same law provided that suits against counties may be commenced and prosecuted in the circuit court of the county against which the action is brought; that "may" means "shall" when applied to public officers or rights of third parties, as declared in Supervisors v. United States, 4 Wallace, 435; that the same section contained the exemption from execution and sale of court houses and other public buildings, which has never yet been disregarded by any court, and that the same law contained the provision about leaving a copy of the original summons in suits against counties with the clerk of the county court, but did not declare the same a sufficient service in such actions. No provision is anywhere made for suits against counties in Missouri, except in the circuit court of each county. It has been only twenty years since one of the ablest judges of the Supreme Court of the United States protested against the gradual advance by which federal courts claimed the right to sue even complete private corporations of a state, under the assumption that they were "citizens," and it is earnestly contended by defendant's counsel in the Ralls and Lincoln cases that, if a mere political division of a state, still so identified therewith that under the sanction of its court of last resort, (36 Mo. 294, invariably relied upon by bondholders, and 55 Mo. 295), the legislature may create, alter and abolish them, or without the assent of the citizens thereof, may ruin them at pleasure by the imposition, without their assent, of overwhelming debts, is to-day to be regarded as a complete corporation or "citizen," and sued in federal courts, the day is not far distant when the prohibition of suits in federal courts against sovereign states without their consent, will be construed away as a right waived by some loosely-worded act concerning state contracts or the state court of claims, or other means of suit against the state which the constitutions of Misouri have, for fifty-eight years, required the general assembly to enact.

Mr. Overall, contra.

DILLON, J., in substance, said: "This is not a new question. [He then referred to the decisions of the federal courts already cited.] The statute of Missouri does not, in our judgment, take the case out of the reasoning of these decisions. If it did, it would, under the ruling in Insurance Co. v. Morse, 20 Wall. 445, be unconstitutional. We can not assent to the conclusion that it is within the power of the state to create political bodies capable of contracting debts with citizens of other states, and yet privileged against being compelled to pay those obligations by suit in the national courts."

This case will be carried to the Supreme Court of the United States. We are clear of all doubt that that court will decide that when the Legislature of Missouri clothed Lincoln county with the power of emitting these bonds, it fastened upon it by implication the corresponding liability of being compelled to pay them, by suit brought against it in any appropriate tribunal. We do not share in the apprehension of the learned counsel for the debtor in this case, that there is danger of the federal court so far absorbing jurisdiction as (putting it our way) to compel the states to pay their honest debts; but if such an usurpation of jurisdiction were possible, we doubt whether any great public calamity would attend such a result. Two of these states, at least, have, in the exercise of this so-called "sovereign" power, deliberately repudiated their honest obligations, bringing, in each instance, an ineffacable stigma upon the American name. The less we have of this peculiar incident of "sovereignty" the better.

A CORRESPONDENT writes: "I lately had occasion to use a Georgia case relating to criminal bail, in which Peters, J., indulged himself in a facetious dissenting opinion, and said: 'After his (a prisoner's) release on bail from custody, he may lawfully leave the court, the county, the state or the nation. And he may go away at just such rate of speed as suits him, and at his own time; he may run away if he thinks it best.'"

SEPARATION OF JURY BEFORE RENDITION OF VERDICT.

COMMONWEALTH v. TOBIN.

Supreme Judicial Court of Massachusetts (Suffolk), January Term, 1878.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD,
" AUGUSTUS L. SOULE,

1. SEPARATION OF JURY — REQUISITES OF VERDICT.—In criminal cases, other than capital, the jury may, if they should agree upon a verdict during the adjournment of the court, sign and seal up their finding, and come in and affirm it at the next opening of the court; but such verdict to be legal and effectual must be orally and publicly stated by the foreman in open court.

2. A VERDICT WHICH HAS NEVER BEEN SPOKEN by the jury can not be implied from the mere omission of the jury to contradict the statement of the clerk as to what verdict has been rendered, or from the silence of the prisoner and his counsel.

Mr. Riley and *Mr. Russell*, for the defendant; *Mr. Train*, Attorney-General, for the Commonwealth.

INDICTMENT for manslaughter.

After a verdict of guilty, the defendant filed a motion that the verdict be set aside for the following, among other reasons: Because, after the case was given to the jury, and before any verdict was rendered, they had separated without the knowledge or consent of the defendant.

Upon the hearing of the motion the following facts appeared. The jury retired to consider their verdict during the morning session of the court, and, at the time of the adjournment of the court in the afternoon, they had not agreed. The presiding judge adjourned the court, and on his way from the bench to the lobby, and within two minutes after the formal adjournment of the court, instructed the officer in charge of the jury, without the knowledge or consent of the defendant or his counsel, that if the jury agreed before the coming in of the court, on the following morning, he might permit them to seal up their verdict, separate, and return with their verdict into court, at the opening thereof in the morning.

The jury thereafter, and about six o'clock in the evening, did agree upon a verdict of guilty, which the foreman wrote into a printed blank, signed and sealed up with the other papers in the case in the presence of all the jury. The foreman then informed the officer that the jury had agreed and had sealed up their verdict, and they were allowed to separate. At the opening of the court, the next morning, all the members of the jury, the defendant, and one of his counsel, were present in court. By direction of the court, the clerk was directed to take the verdict. The clerk called defendant by name, and then said: "Gentlemen of the jury, have you agreed upon your verdict? The foreman answered, "We have," and handed, by the officer, a sealed envelope to the clerk, who broke the seal, and took therefrom a paper, of which the following is a copy, and read the same to the jury:

"Commonwealth of Massachusetts. } Suffolk, ss. }

Superior Court for the transaction of criminal business.

March Term, A. D. 1878.

Commonwealth v. Cornelius Tobin.

In the above entitled case, the jury say that the defendant is *guilty*, and this is their verdict.

John Salmon,
Foreman.

Instructions by the court:

The above blank may be filled with the word "guilty" or the words "not guilty," as the jury may find the defendant to be one or the other. It is then to be signed by the foreman, and sealed up in an envelope, with the other papers in the case, before the jury separate."

The clerk then said: "Gentlemen of the jury, hearken to your verdict as the court has received it. You, upon your oaths, do say that the prisoner at the bar is guilty. So you say, Mr. Foreman, and so, gentlemen, you all say." The above is all that was said. The foreman, after he had sealed the verdict, as above stated, kept the same in his possession until he delivered it to the clerk, when the verdict was returned, and he testified that it had never been opened. In relation to the above facts, the defendant and his counsel knew that the jury had separated after the adjournment of the court; but, as to all the other facts above stated, after the court adjourned, and until after the rendition of the verdict, they were ignorant.

The motion to set aside the verdict was not made until some hours had elapsed after the rendition of the verdict. Upon the above facts, the court overruled said motion and the defendant excepted.

GRAY, C. J., delivered the opinion of the court.

By the law of England, in cases of felony, the only verdict allowed was a public verdict, pronounced by the foreman in open court, and in the presence of the prisoner. In prosecutions for misdemeanors, and in civil cases, although the jury were permitted to separate, upon giving a privy verdict orally to the judge out of court, yet such verdict was of no force unless afterwards affirmed by an oral verdict given publicly in court, and the only effectual and legal verdict was the public verdict. 3 Bl. Com. 377; 4 Bl. Com. 360; 1 Chit. Crim. Law, 635, 636.

In this country, by way of substitute for a privy verdict, and to attain the same end of allowing the jury to separate after they have come to an agreement, a practice has been adopted—in civil actions and in cases of misdemeanors, at least, if not of all but capital crimes—of directing the jury, if they should agree during the adjournment of the court, to sign and seal up their finding, and come in and affirm it at the next opening of the court; but the verdict which determines the rights of the parties, and is admitted of record, and upon which judg-

ment is rendered, is the verdict received from the lips of the foreman in open court. When the jury have been permitted to separate after agreeing upon and sealing up a verdict, there is this difference between civil and criminal cases. In a civil action, if the written verdict does not pass upon the whole case, or the jury refuse to affirm it, the court may send them out again, and a fuller or different verdict afterwards returned will be good. But in a criminal case the oral verdict pronounced by the foreman in open court can not be received unless it is shown to accord substantially with the form sealed up by the jury before their separation. Lawrence v. Stevens, 11 Pick 501; Pritchard v. Hennessey, 1 Gray, 294; Com. v. Townsend, 5 Allen, 216; Com. v. Durfee, 100 Mass. 146; Com. v. Carrington, 116 Mass. 37; Domick v. Rickenback, 10 S. & R. 84; Lord v. State, 16 N. H. 325.

By the settled practice in this commonwealth, the course of proceeding upon the return of the jury into court in criminal cases, is as follows: The clerk asks the jury if they have agreed upon their verdict. If the foreman answers that they have, the clerk then asks whether they find the defendant guilty or not guilty. The foreman answers "guilty," or "not guilty." The clerk then makes on the back of the indictment a minute of the verdict so returned, and, having done this, says to the jury: "Gentlemen of the jury, hearken to your verdict as the court has recorded it. You, upon your oath, say that the prisoner at the bar is 'guilty'" (or "not guilty"). "So you say, Mr. foreman, and so, gentlemen, you all say."

The question of the clerk whether the jury have agreed upon their verdict, and the answer of the foreman that they have, are merely preliminary, and do not show what the verdict is. The form of verdict signed and sealed up by the jury has no weight or effect, except to preclude the idea of the jury having been influenced in arriving at their oral verdict, by anything that has occurred in the interval between their separation and their return into court. Com. v. Carrington, 116 Mass. 37, 40. The final declaring of the verdict by the clerk assumes it to have been already rendered by the jury and recorded by the court, and is intended to proclaim the actual and formal decision of the jury as understood by the court, and to enable any misapprehension in the record of that decision to be corrected by the jury before they are discharged. Rex v. Parkinson, 1 Moody, 45; Reg. v. Vodden, Dearsley, 229; s. c. 6 Cox C. C. 226. Any or all of these precautions for making sure that the verdict expresses the deliberate conclusion of the jury can not of themselves constitute a verdict, or dispense with the return of a verdict in proper and legal form.

The law requires the double safeguard against mistake: First, the delivery of the verdict by the foreman as the organ of the jury by word of mouth in open court, under the sense of responsibility attending such an utterance in the face of the court and of the public, and, in a case of felony, of the accused; and, second, the proclamation by the clerk of that verdict as understood and recorded by the court. The fact that in this commonwealth the defendant is not entitled or permitted, as he is in England and many states, to have the jury polled, makes it peculiarly important for the security of his right to adhere to the established forms, remembering the words of Chief Justice Shaw: "In this respect it is true that forms are substance." Com. v. Roby, 12 Pick. 496, 514, 515.

In the case at bar, after the jury, upon their return into court, had been asked whether they had agreed upon their verdict and the foreman had answered that they had, the form of verdict which had been signed and sealed up before the jury separated was silently delivered by the foreman to the clerk and was opened and read by the clerk to the jury. The clerk thereupon told the jury (in the words accustomed to be used after the verdict has been pronounced by the foreman and minuted by the clerk) to hearken to their verdict as the court had recorded it. And the bill of exceptions states that "the above is all that was said."

In Com. v. Carrington, already cited, upon which the attorney-general principally relies, the bill of exceptions stated that, before the verdict was recorded, the clerk asked the jury if their verdict was that the defendant was guilty, to which they assented; and although the precise form in which such inquiry and response were expressed was not set forth in the bill of exceptions, it was assumed both by the counsel and the court, that an oral verdict had been returned in due form, if any such verdict could be received after the jury had separated and had brought in a sealed verdict.

But in the present case, it distinctly appears that when the clerk told the jury to hearken to their verdict as recorded, no legal or effectual verdict had been rendered by the jury, and they had not been asked, nor, in any form of words, orally and publicly stated, what their verdict was; and that, after they had been told that a verdict of guilty had been received, they simply said nothing. A verdict which has never been spoken by the jury can not be implied from the mere omission of the jury to contradict the statement of the clerk, or from the silence of the prisoner and his counsel.

The verdict received and recorded by the court not being a legal verdict, it was the right of the defendant, upon his motion filed on the same day, to have it set aside. The order of the supreme court, overruling this motion and denying him this right, was a decision upon a question of law which could not have been raised before verdict, and was therefore a proper subject of a bill of exceptions. Gen. Sts., c. 115, § 7.

As for these reasons, the defendant, in the opinion of a majority of this court, is entitled to a new trial, it is unnecessary to consider whether the instructions given by the judge to the officer after the court had adjourned, and in the absence of the defendant and his counsel, or those communicated to the jury by the novel, and, so far as we are informed, unprecedented method of printing them on a blank form of verdict, legally justified the separation of the jury before they returned into court.

Exceptions sustained.

RECEIVERS' CERTIFICATES — POWERS OF RECEIVERS — RIGHTS AND DUTIES OF HOLDERS.

BANK OF MONTREAL v. CHICAGO, CLINTON & WESTERN R. R.

Supreme Court of Iowa, June Term, 1878.

Hon. JAMES H. ROTHROCK, Chief Justice.
" WM. H. SEEVERS,
" JAMES G. DAY,
" JOSEPH M. BECK,
" AUSTIN ADAMS,
Associate Justices.

A RECEIVER being an officer of the court has no implied powers other than those derived from the order of the court. He could not issue certificates which would constitute a first lien on this road, except for money borrowed, material furnished, or labor performed. The certificates, although they are in many respects like negotiable paper, yet it is the duty of the purchaser to see under what authority they are issued, and the plaintiff is not such a holder as will cut off the equities existing between the original parties to these certificates.

Appeal from Clinton District Court.

This action was commenced by the Joliet Iron and Steel Co., against the corporation defendant, in November, 1875, to enforce an alleged lien. E. H. Thayer was appointed receiver of the company.

In July, 1876, the corporation receiver and certain other parties being represented and before the court, the following order was entered of record: "That the said receiver be and is hereby authorized and empowered to proceed to complete and build all the unconstructed portions of the line of the railroad of said Chicago, Clinton and Western Railroad Company, from Clinton, in Clinton Co., Iowa, to Iowa City, in Johnson Co., Iowa, and to put those portions of said line in good order and condition to be operated as a railroad. All of said construction and work said receiver is authorized to have done directly under his own management, or by contract of the whole of said work, or in part thereof, as may be in his judgment most advantageous and expedient, and to do the same as early as practicable. And said receiver is further authorized and directed to do and perform all the acts and things necessary to be done and performed to construct and complete said line of railroad, as above directed, and for such purpose the said receiver is hereby authorized and empowered to borrow, on such terms as to time of payment and rate of interest, as in his judgment may seem advisable, such sum or sums of money, and to make such indebtedness as shall be necessary for the further construction, equipment and final completion of said road, not to exceed eight thousand dollars per mile upon the whole line of said road, completed, and to be completed, and to make and issue to the person or persons of whom said money may be borrowed, or to whom such indebtedness may be due, but only such as is incurred by said receiver, his debentures or certificates, with the interest expressed in their body or in coupons or interest warrant attached, signed by him as such receiver, but not personally; and it is further ordered and decreed that such debentures and certificates, issued by said receiver, in pursuance of the order herein made for the construction and completion of said road, whether for money borrowed, material furnished, labor performed or on account of contracts made by him for or on account of the construction or completion of said road, or any part thereof, shall be, and they are hereby adjudged to be, and shall be held and treated as receiver's indebtedness, and as such are decreed and adjudged to be a first lien for the principal and interest thereof, upon the entire line of said railroad, including the road-bed, iron, right of way, rolling stock, taxes, income and earnings of said road, and all the property, rights, interests and franchises of said railroad company now in existence or hereafter accruing or belonging to said company prior to any other lease or claims thereon whatsoever."

Afterwards the receiver, under said order, issued certain certificates, some of which having been acquired by the South St. Louis Iron Co., that company filed its petition of intervention to establish its lien, and have the property sold to satisfy the same.

In November, 1877, the plaintiff, claiming to be the owner of certain of said certificates, filed its petition of intervention, asking the establishment of its lien, and that the property be sold to satisfy the same. The certificates owned by the plaintiff, amounting to $25,000, were all of the form following:

No. 28. RECEIVERS' CERTIFICATE. $5,000.

Office of the Receiver of the Chicago, Clinton and Western Railroad, Clinton, Iowa, January 20th, 1877.

This is to certify that there is due on July 16th, 1877, to the Joliet Iron and Steel Co. or bearer, from Edward H. Thayer, as receiver (but not personally) of the Chicago, Clinton and Western Railroad, appointed by the District Court of the State of Iowa, in and for Clinton county, five thousand ($5,000) dollars, with interest thereon from this date, at the rate of seven per cent. per annum, on account of indebtedness incurred by said receiver. This obligation is issued under and by virtue of certain provisions of an order duly entered by the District Court of Clinton County, Iowa, on July 27th, 1876, and is one of a series of receiver's certificates authorized to be issued by such order, and by virtue thereof constitutes a first lien upon the said line of railroad, its appurtenances, franchises and income, being for iron furnished for constructing said road, payable at the Third National Bank, Chicago, Ill. EDWARD H. THAYER,

Receiver of the Chicago, Clinton and Western Railroad.

An answer to the petition of intervention of the plaintiff was filed by the South St. Louis Iron Co., alleging the certificates owned by the plaintiff "were not issued by the receiver in payment of any money borrowed, nor in payment of any indebtedness due to the payee mentioned in said certificates, or any other person, but said certificates (and others of the same date) were issued and delivered to

the Joliet Iron and Steel Co., without any delivery of any other property described in said contract to the receiver, and without any right existing for him to demand or receive any portion of said property. * * * And at the time said contract was made the Joliet Iron and Steel Co. was in fact insolvent, and ever since has been insolvent." A copy of the contract between the receiver and the Joliet Company is attached to and made a part of the answer, from which it appears the contract was made in January, 1876, for the delivery of certain iron rails by the company to the receiver in March, April and May, 1877. The certificates were issued on the same day the contract was entered into in payment therefor, but no part of the rails were ever delivered or tendered to the receiver.

A demurrer to the answer was overruled, and plaintiff appeals.

E. S. Bailey, for appellant; *Cook & Richman*, for the South St. Louis Iron Co.

SEEVERS, J., delivered the opinion of the court:

We have been advised that the authority of the court to make the order in question is denied by certain parties in interest who are not represented on this appeal. We are not advised as to the facts and circumstances before the court when the order was made; therefore that question has not been considered. The authority of the receiver to issue the certificates owned by the South St. Louis Iron Co. is not questioned. The only contested matter before us is as to his authority to issue, and the validity of those owned by the plaintiff. A solution of this question requires a consideration to some extent, at least, of the nature and extent of the powers of a receiver, and the construction of the order of the court.

Counsel for the appellant insist that if a court undertakes to build a railroad by an order entered of record, and directs a receiver to superintend such construction, and authorizes him to do and perform all acts and things necessary to be done to build the road; to borrow money, make contracts, incur debts and issue certificates; that such order should be subject to the same rules of construction as a like power granted by the board of directors to a superintendent of construction. The correctness of this proposition, thus broadly stated, admits of serious doubt.

Ordinarily the duties of a receiver of a railroad only "comprise the operation and management of the road; the payment of current expenses and the application of the residue of the earnings and receipts to the extinguishment of the indebtedness, to secure which the receiver was appointed. The receiver is seldom authorized to enlarge the operations of the company or to extend its line of road, his functions being usually limited to the management of the property in its existing condition for the protection of creditors and subject always to the supervision of the court." High on Receivers, § 390. As to such matters the receiver no doubt possesses all the incidental and necessary power to effectuate the object of his appointment in the absence of any specific directions from the court. The details of the business intrusted to him must of necessity be left to his discretion. But he is uniformly regarded as an officer of the court, and being such the fund or property intrusted to his care is regarded as in the custody of the law; the "court itself having the care of the property by its receiver, who is merely its creature or officer having no powers other than those conferred by the order of his appointment or such as are derived from the established practice of courts of equity." High on Receivers, § 1.

In construing the order it must be borne in mind it confers upon the receiver extraordinary and unusual powers, which, however, it will be assumed, were necessary and proper for the preservation and protection of the property committed to his charge.

He was authorized to "put those portions of such line already constructed, or partly constructed, in good order and condition, and to this end he was empowered to borrow money and incur indebtedness, which was made a "first lien on the entire line of said railroad, including the road bed, right of way, rolling stock, taxes, income and earnings of said road," including all other acquired property. Under such a grant we are constrained to believe the claimed right or power should appear in express terms, or possibly it would be sufficient if it appeared by necessary implication.

Now, while it is true the receiver is authorized to "do and perform all the acts necessary to be done and performed to construct such line of railroad;" yet the means to this end, as we think, are fixed and defined in the order. "For such purpose (the construction contemplated) the receiver is expressly authorized to issue certificates for money borrowed, material furnished, labor performed, or on account of contracts made by him for or on account of the construction or completion of said road or any part thereof." The receiver, being an officer of the court, has no implied powers other than those derived from the order of the court. Such being true, we think it clear he could not issue certificates which would constitute a first lien on the road except for money borrowed, material furnished, or labor performed.

When the material was furnished or labor performed he was authorized to issue the certificates in payment therefor, and not until then. And if he made a contract for the construction of the road he might issue certificates as the material was furnished or the labor performed, and on the completion of the road he could issue his certificates in final payment. But the power is not conferred to issue certificates in payment for material not furnished or labor not performed. On the contrary, we are of the opinion, it fairly appears he was prohibited from so doing. If the necessity existed for enlarged powers, they should have been applied for. Cases have been cited by counsel where courts have expressly authorized their receivers to issue negotiable securities, but such are not applicable.

It is insisted, however, that the certificates are negotiable, and as the plaintiff is an innocent holder for value they are not subject to the equities between the parties thereto. No adjudicated case precisely in point has been cited by counsel.

As the certificates on their face state they were "issued under and by virtue of certain provisions of an order duly entered by the District Court of Clinton county, Iowa, on July 27, 1876," the plaintiff is chargeable with notice of all such order contains. Whether under the order the receiver had the power to issue negotiable securities, or for property agreed to be delivered at a future day, were legal questions which the plaintiff was bound to dertermine at his peril. The receiver's authority was bounded and limited by the order. He had no general powers, except such as could be derived therefrom. It is true he had the power to issue certificates, but this was not unlimited. It was only in certain cases he could do so. And being an officer of the court and vested with the care of property in his charge as such officer, we think the plaintiff was bound to know whether these certificates were issued in accordance with the terms and contingencies contemplated by the order.

We conclude, therefore, the plaintiff is not such a holder as will cut off the equities existing between the original parties to these certificates.

Affirmed.

FEDERAL COURTS — STATE ATTACHMENT LAWS.

LEHMAN v. BERDIN.

United States Circuit Court, Eastern District of Arkansas, April Term, 1878.

Before HON. HENRY C. CALDWELL, District Judge.

1. THE CIRCUIT COURTS OF THE UNITED STATES give effect to the attachment laws of the state, and are bound by the construction placed upon such laws by the supreme court of the state.

2. GIVING OF BOND DOES NOT PREVENT TRAVERSE OF AFFIDAVIT FOR ATTACHMENT.—The execution by the defendant in the attachment, in order to regain possession of the property attached, of a bond, under section 416 of the Code of Arkansas, conditioned to "perform the judgment of the court," does not estop the defendant from traversing the affidavits for attachment, and defending against the attachment in every respect as if such bond had not been executed and the property had remained in the hands of the officer.

3. IF THE ATTACHMENT IS NOT SUSTAINED, the plaintiff, though he recover judgment for his debt, can not resort to the bond to compel payment of such judgment.

The plaintiffs brought suit against the defendant on a promissory note, and sued out an attachment on the alleged grounds that the defendant had sold, and was about to sell his property with the fraudulent intent to cheat his creditors. The marshal levied the writ on certain property of the defendant, who thereupon caused a bond to be executed to the plaintiffs, conditioned as required by section 416, Gantt's Digest, which section reads as follows: "If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff, by one or more sufficient sureties, to be approved by the court, to the effect that defendant shall perform the judgment of the court, the attachment shall be discharged, and restitution made of any property taken under it, or the proceeds thereof."

At this term the defendant filed an affidavit under section 457, Gantt's Digest, denying the statement of the affidavit upon which attachment issued. The plaintiffs have filed a motion to strike from the files defendant's affidavits, controverting the grounds of attachment.

Cohen & Cohen, for plaintiffs; *Wassell & Moore,* for defendant.

CALDWELL, J.:

The reasons assigned in support of the plaintiffs' motion to strike from the files the defendant's traverse of the grounds of attachment are, that the execution by the latter of the bond under section 416, Gantt's Digest, operates (1) to discharge the attachment; (2) estops the defendant from contesting the validity of the attachment on any grounds, or for any purpose; and (3) renders the obligors in the bond liable absolutely for the amount of any judgment the plaintiffs may recover in the action, without reference to the question whether the attachment was rightfully or wrongfully sued out. There are adjudged cases in some of the states that seem to support this view. Hoezilligg v. Donaldson, 2 Met. 445; Imman v. Stratton, 4 Bush. (Ky.) 445; Deerolf v. Winterfield, 24 Wis. 143; Endress v. Ent, 18 Kas. 236; Payne v. Snell, 3 Mo. 409; Kennedy v. Morrison, 31 Tex. 207.

But the question is one in which the law of this state, as construed by the supreme court of the state, furnishes the rule of decision to this court. The question has not been before that court since the adoption of the code, but it arose under prior statutes, which were the legal equivalent of section 416 of the code. Under the revised statutes of this state, the defendant in an attachment suit might retain the property attached upon giving bond conditioned "that he will pay and abide the judgmen t of the court, or that his security will do the same for him," and it was further provided that "when the defendant shall have filed the bond, as required in the last preceding section, *the attachment shall be released, and the suit proceed as other suits at law.*" Sections 13 and 14, chapter 17, Gould's Digest.

In Delano v. Kennedy, 5 Ark. 457, the question was presented, whether giving the bond provided for by these sections precluded the defendant from pleading in abatement the want of a sufficient attachment bond, and the court held it did not, and that the legal effect of giving such bond was to discharge the property from the lien of the attachment and substitute the defendant's bond in its stead; that in all other respects the rights of the parties in the attachment proceeding remained the same as though no bond had been given, and the property had remained in the hands of the officer. Chief Justice Ringo dissented from the judgment of the court, and, in his dissenting opinion, states very concisely the views maintained, respectively, by the majority and minority of the court. He said: "The majority of this court, if I correctly

understand their opinion, hold that the legal operration of this act of the defendant's is to release so much of the attachment only as operates upon and binds their property, by substituting, instead thereof, the bonds and personal security taken by the sheriff, but that it has no effect whatever upon the attachment bond filed by the plaintiff. I hold that the legal operation thereof is to release the whole attachment, and place the parties to the action, respectively, in the same situation as if the original process had been a writ of *capias ad respondam*, instead of an attachment, and that the proceedings in the writ thenceforward must be the same as if no such bond had been given, and no process other than a *capias* issued."

In Childress v. Fowler, 9 Ark. 159, the court was asked to review the ruling in the case of Delano v. Kennedy, *supra*, and, in view of the dissent of the chief justice in that case, it did so, and after full argument reaffirmed the doctrine in that case, in an elaborate opinion, concurred in by all the judges, and which concludes in this language: "We therefore hold that the execution of the bond, authorized by the 13th section, does not impair any of the defendant's rights of defense, and that, after its execution, he may defend the action either by plea in abatement, interposed in apt time and in due form, or by plea in bar in the same manner, in every respect as if he had not executed the bond and had suffered the property attached to remain in the hands of the sheriff."

After these decisions were pronounced, and by act of March 7th, 1867, the attachment law of the state was amended so as to allow the defendant to put in issue the truth of the plaintiff's affidavit to procure the attachment, thus making the law in this respect what it now is under the code; and this amendatory act further provided that the defendant might "give bond to dissolve the attachment." And section six declared: "That the conditions of bonds of persons dissolving attachments shall hereafter be, that he will appear and answer the plaintiff's demand at such time and place as by law he should, and that he will pay and abide the judgment of the court."

It will be observed that the language of this section, like that of the revised statutes, is better calculated to support the plaintiff's' contention than is the language of section 416. And in the case of Wood v. Carlton, 26 Ark. 662, the very question before the court was presented to the supreme court of the state for its determination. The defendant, whose property had been attached, had given the bond required by the act of March 7, 1867, and the court below had thereupon declared the attachment "dissolved." Afterwards the defendant filed his plea denying the truth of the plaintiff's affidavit upon which the attachment was issued. The court say: "The plaintiff urges on the court that the giving of the bond precludes all inquiry into the truthfulness of the affidavit. If it be admitted that the defendant, after giving bond, can not question the truthfulness of the original affidavit, the result is that the plaintiff, by his perjury, is allowed to hold the principal and his sureties for the amount of his judgment." And after entering into a forcible argument to show that such a construction of the statute would not be in harmony with the objects and purposes of the attachment law, and would favor the unscrupulous creditor, and result prejudicially to conscientious creditors and honest debtors alike, the court in conclusion say that after the execution of such bond, "the defendant may show, at any time before judgment, that the original affidavit is not true." These authorities are decisive of the question in this state.

It is argued that the Kentucky ruling on the question should be followed by the courts in Arkansas, because the code of the latter state is a copy of the code of the former, and the section under discussion identically the same in both.

If the section of the code in question was new law in this state, there would be some force in the suggestion; but, as we have seen, this provision is in legal effect precisely what the former law of the state was—is, in fact, a mere re-enactment of the old law; and if the legislature is to be credited with legislating in reference to knowledge of the decisions of the courts upon this question, the presumption must be indulged that they were more familiar with the decisions of their own courts than with those of a sister state, and that they did not, by simply re-enacting a statute of the state, intend to change its meaning, or adopt an exposition of such statute by the courts of a sister state opposed to the views of the supreme court of their own state.

Moreover, the provision is not peculiar to the Kentucky code, but was found in the codes of New York and Ohio, and probably other states, before its adoption by the former state (see sections 199 and 212 Ohio code, and 240 and 241 New York code); and the construction of the section by the New York and Ohio courts is in harmony with the decisions in this state, and opposed to the view of the Kentucky courts.

Under the New York code the attachment may be discharged upon the execution of a bond by the defendant, conditioned that the sureties "will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action." Sec. 241 New York code. A defendant whose property had been attached, gave bond conditioned as required by the section last above quoted; the attachment was thereupon discharged. Afterwards the defendant filed his motion and affidavits to vacate the attachment proceedings, on the ground that sufficient facts to authorize its issue did not exist at the time it was granted, and the court entertained this motion and sustained it, and an order was made vacating the attachment proceedings. Plaintiff in the action recovered judgment for his debt, and it remaining unpaid, suit was brought on the bond given by the defendant to procure the discharge of the attachment, and the court held that the attachment having been set aside upon the ground stated, the consideration for the execution of the bond had failed, and that it could not be enforced. Bildersee v. Aden, 10 Abb. Pr., N. S. 163.

And the previous rulings in that state were to the same effect. Caldwell v. Colgate, 7 Barb. 253;

Homan v. Brinckerhoff, 1 Denio, 184. And the same doctrine is maintained in Ohio. Fortman v. Rottier, 8 Ohio St. 553; Alexander v. Jacoby, 23 Ohio St. 358. In the case last cited the court say: "The interest of a party may imperatively require that his property shall be released from a wrongful attachment without delay. May he not, in such case, promptly procure the discharge of the attach ment by payment of the claim on which it is founded, or by executing an undertaking according to statute, and thus arrest the threatened ruin without abandoning his rights to redress for the injury already done?" And the court declares the execution of such bond "can not be regarded as an admission of record that the order of attachment was rightfully obtained."

The Louisiana code provides that the defendant may have the property released upon the execution of a bond, conditioned "that he will satisfy such judgment to the value of the property attached as may be rendered against him in the suit." And the uniform ruling in that state has been that the giving of such bond does not preclude the defendant from afterwards contesting the validity of the attachment, on the ground that it was obtained on a false allegation, or upon any other sufficient ground. Pailhes v. Roux, 14 La. 83; Love v. Voorhies, 13 La. Ann. 549; Myers v. Perry, 1 Id. 372; Brinegar v. Griffin, 2 Id. 154; Avet v. Albo, 21 Id. 349. When a bond is given under section 406, the property is not discharged from the lien of the attachment; the defendant may lawfully retain possession of it, but until the attachment is disposed of it can not be again attached or levied upon, except subject to the prior levy, and the defendant can not sell it divested of the lien of the attachment. Hagan v. Lucas, 10 Peters, 400; Drake on Attachment, sec. 331. And if the attachment is sustained the court must, in addition to rendering judgment for the debt, condemn the property attached to be sold to satisfy the judgment, (Sections 455 and 456 Gantt's Digest; Goss v. Williams, 46 Ind. 253); and now, under the act of November 10, 1875, may at the same time assess the value of the property; and "render further judgment that in case said property shall not be delivered, etc.," execution shall issue against the sureties, etc.

When the bond is given under section 416, the property attached is discharged absolutely from the lien of the attachment, and the bond stands as security to the plaintiff in lieu of the property; and if the plaintiff recovers judgment for his debt, this alone does not give him a right to enforce the bond; but he must also, in order to bind the obligors in the bond, have judgment sustaining the attachment (sec. 456), and he is then, under the act of 1875, entitled to a judgment against the defendant and his sureties in the bond for the amount recovered and costs. In such case the property attached is not condemned to be sold, because it has been released from the lien of the attachment and the bond substituted in its place; and this is all the difference in legal effect between a bond executed under section 406, and one executed under section 416. Bell v. Western, etc., Co., 3 Met. (Ky.) 558; Goss v. Williams, *supra*.

In neither case can the plaintiff resort to the security of the bond, unless his attachment is sustained; and in neither case is the defendant estopped from showing, at the proper time and in the proper manner, that the attachment was procured, upon false allegations of fact or otherwise, in violation of law. Sections 456, 457, Gantt's Digest. Bildersee v. Alden, *supra*; Delano v. Kennedy, *supra*; Childress v. Fowler, *supra*; Ward v. Carlton, *supra*; Pailhis v. Roux, *supra*; Cadwell v. Colgate, *supra*; Homan v. Brinkenhoff, *supra*; Alexander v. Jacoby. *supra*.

If the defendant is estopped from contesting the attachment, after giving bond under section 416, the estoppel will apply as well after the execution of the bond under section 406; for, so far as relates to the effect of the defendant's bond on his right to contest the attachment, there is no difference in the two sections.

The condition of the bond is that the defendant will "perform the judgment of the court;"—judgment of the court upon what and for what? The answer is found in section 456: "*Upon the attachment being sustained* the property attached or its proceeds, *or the securities taken upon the attachment*, shall be applied," etc.

The judgment, then, which the defendant's sureties must "perform" is a judgment, that the plaintiff rightfully attached the defendant's property for the debt found to be due, and is therefore entitled to the security resulting from the attachment—in other words, a judgment sustaining the attachment—a judgment which would reach the property attached, if no bond had been given. Goss v. Williamson, 46 Ind. 253; Inbusch v. Farwell, 1 Black. 572, 573.

Indebtedness alone is no ground for attachment; other facts must concur to render the attachment lawful, and giving this bond, does not in this state supply the place of these other facts, nor estop the defendant from denying their existence.

The motion to strike out the defendant's affidavits traversing the attachment is overruled.

CONSTRUCTION OF AN AUTHORITY TO RECEIVE PAYMENT.

The recent decision of Mr. Justice Fry in Pearson v. Scott, 13 L. T. N. S 747, is an authority upon several points connected with the rule that an agent to receive payment is only authorized to receive it in cash, as well as upon the effect of the usage in enabling him to receive payment by a settlement on account.

As a general rule the owner of goods sold is entitled to receive the price of those goods, unless by improper conduct on his part he has enabled some other person to appear as owner, and by that means to impose on a third person without any fault of that person. Hence the three questions put by Mr. Justice Bayley, in Baring v. Corrie, 2 B. & Ald. 137, 146, to determine whether an owner is entitled to claim payment of goods sold by his agent to a person who claims to set off against the price a debt due to him from the agent, are:

first, did the plaintiff enable his agent to appear as proprietor of the goods, and to practice a fraud upon the defendant? secondly, did the agent practice a fraud? and thirdly, did the defendant use due care and diligence to avoid such fraud?

A person who knows another to have in his hands or under his control moneys belonging to a third person, cannot deal with those moneys for his own private benefit, when the effect of that transaction is the commission of a fraud on the owner. Hence, where a receiver of an estate, who had a private account at his bankers, opened another there under the name of the estate, under such circumstances as to inform the bankers that the money which would be paid in to that account would belong to the owner of the estate, and the receiver drew a cheque on the estate account and paid it into his private account, the court held that the bankers were liable to repay the amount to the owner of the estate: Bodenham v. Hoskyns, 21 L. J. 864 Ch.; 2 D. M. & G. 903.

Baron Alderson in Barker v. Greenwood, 2 Y. & C. Ex. 414, stated, as a settled rule, that "an agent with a general account like this is only bound to receive payment in such a way as thereby to put it in his power completely to discharge the duty he himself owes his principal. If, therefore, he is bound to pay the whole over to the principal, he must receive it in cash from the debtor, and a person who pays such an agent, and who means to be safe, must see that the mode of payment does enable the agent to perform his duty."

In Todd v. Reid, 4 B. & Ald. 210, decided in 1821, which was an action by the assured against an underwriter, an attempt was made to set up the defence that it had been the practice at Lloyd's for many years to settle lossses in accounts between the broker and the underwriter. Upon this custom the argument was founded that the money so allowed in account between the broker and underwriter was equivalent to payment to the assured. The court, however, held that the broker, as agent of the underwriter, was only entitled to receive payment in money, and that no usage could sanction such a practice as that relied on.

The last case is reported very briefly, but a similar question again came before the King's Bench in Bartlett v. Pentland, 10 B. & C. 760, in 1830. "In this case," said Mr. Justice Bayley, "the company knew at the time when the policy was effected that it was effected for the benefit of the plaintiff; and a loss having occurred, they were bound to pay that loss, either to the plaintiffs themselves, or to some person who was duly authorized by the plaintiffs to receive it; and in making the payment to a third person it was their duty to see whether he was authorized or not. Here the company, knowing who the principals were, might have paid the broker by accepting a bill payable to the order of the principals, and by adopting that course would have been perfectly secure. But if, instead of making the payment in that way, they make the payment to the broker in a manner which gives the latter an opportunity of misapplying the money, then, as the broker was not authorized to receive payment in that way, it was done at the peril of the underwriters." The case of Russell v. Bangley, 4 B. & A. 395, was quoted to show that if the name of the underwriter was struck off the policy, and the assured forebore to call for payment within the period warranted by the usage of the trade, the underwriter might be discharged. Lord Tenterden qualified this rule by stating that it applied only where the name was struck of with the assent of the assured.

Scott v. Irving, 1 B. & Ad. 605, another decision of the King's Bench in the same year, affords a further illustration of the principles of the above cases. There the loss was settled in part by the underwriter setting off in account against it a debt due to him from the broker for premiums, and as to the residue by payment to the broker in cash. The underwriter then crossed his name from the policy. The broker became bankrupt. The court held that the plaintiff was entitled to recover the amount allowed in account between the broker and the underwriter. The statement of the law by Mr. Justice Taunton is exceedingly clear. "It is fully settled by Todd v. Reid, and Bartlett v. Pentland *sup.*," said his Lordship, "that the underwriter, in order to be discharged must pay the broker in money, and that the latter can not make a set-off between him and the underwriter payment to the assured; and there are no particular circumstances to take this case out of the general rule. Russell v. Bangley, *sup.*, is very similar to the present case, although this is distinguishable in two circumstances. The plaintiff here has dedelayed proceedings for a considerable time after being informed of the state of accounts between the broker and the underwriter. But the defendant's situation has not been altered by that circumstance, and again the defendant's name in the policy is cancelled in the present case. But it was not said in Russell v. Bangley that the fact is conclusive; and here the defendant was not cognizant of it. The payment of £54 was a good part payment. It was not made contrary to the contract; for though it was stated in the written adjustment that the loss was payable in one month, it might be paid in a less period." In Campbell v. Hassell, 1 Stark. 233, the payment was in direct contradiction to the original contract.

Baring v. Corrie, 2 B. & Ald. 137, which was decided in 1818, was an action to recover the price of goods. The defence was that the defendants bought them of brokers, against whom they had a counter-claim. From the evidence it appeared that the plaintiff's brokers acted as merchants also, but the defendants did not make any inquiry whether they acted in the particular transaction as brokers or merchants, nor were they required to sign a bought note. "Now," said Chief Justice Abbott, "without entering into the question whether or not, under such circumstances, the bargain could be enforced, it is quite sufficient to say that the ordinary course of dealing was not pursued, and that enough appears to show that the defendants negligently abstained from making those inquiries which they ought to have made. I think, therefore, that they ought not

to be allowed the set-off which is claimed; and my opinion is founded on the difference between the characters of factor and broker, and on the plain distinction between the cases cited and this. For even admitting it to be true that where two persons equally innocent are prejudiced by the deceit of a third, the person who has put the trust and confidence in the deceivers should not be the loser, I think the defendants are the persons who have in this case placed more than usual confidence in Coles and Co.," the plaintiff's brokers.

The decision of the Court of Exchequer in Stewart v. Aberdein, 4 M. & W. 211, in the year 1838, has been considered an authority for the proposition that the above usage is binding without notice. That, however, is not so, for it was there assumed that the usage was known and assented to by the assured. In delivering the judgment of the court, too, Lord Abinger was careful to point out that it was not to be considered that by its decision the court meant to overrule any case deciding that where a principal employs an agent to receive money, and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor, by a set-off in account with him.

"The court is of the opinion," said his Lordship, "that where an insurance broker or other mercantile agent has been employed to receive money for another in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors, with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases can not properly be applied; but it must be understood that where an account is *bona fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor according to the meaning and intention, and with the authority of the principal." It is very clear from the judgment that the court was fully of opinion that there was evidence that the assured was aware of the custom. Hence, however much this decision may appear to differ from any other, the principle upon which it turned is at one with the *ratio decidendi* of the authorities upon the subject.

The effect of the above usage was again discussed by the Common Pleas in Sweating v. Pearce, 7 C. B. N. S. 449, which was decided in 1859. There the plaintiff, a ship-builder in London, employed one W., an insurance broker, to effect a policy upon a ship at Lloyds, and, after the happening of a loss, gave the ship's papers for the purpose of enabling him to adjust the loss with the underwriters. The policy was effected in W.'s name, and he had retained possession of it. An adjustment having taken place, the loss was settled in accordance with the above usage. It was admitted that the usage was not known to the plaintiff, who had merely left the policy in W.'s hands for safe custody; but the jury found that it was generally known to merchants and ship-owners effecting insurances. The verdict was entered for the plaintiffs, but a rule *nisi* to enter it for the defendant was granted, on the authority of Stewart v. Aberdein, 4 M. & W. 211, and some other cases. In showing cause it was argued for the plaintiff, on the authority of Russell v. Bangley, 4 B. & Ald. 398, that if the assured can, upon all the facts of the case, be shown to have been cognizant of the usage of settling losses in account at the time he procured the insurance to be effected, he is bound by it, but not otherwise; that, in short, the cases proceed not upon the usage of the particular market, but upon the presence or absence of knowledge. On the other hand, it was argued that Graves v. Legg, 2 H. & N. 210, is conclusive to show that one who employs an agent to make a contract in a particular market, must be taken to authorize him to make it subject to all the incidents of a contract entered into in that market, and that the true principle to be deduced from the cases is, that if the usage be general, the party is presumed to know it; but that, if it be a particular or local usage, his knowledge of it must be shown by evidence. In discharging the rule, the court, whilst admitting that while the policy remained in the hands of the brokers, the plaintiff was estopped from saying that it was not in his hands with authority to collect, held that Scott v. Irving, 1 B. & Ad. 605, applied. In dealing with the case of Graves v. Legg, *supra*, Mr. Justice Williams observed that he was not inclined to dispute the proposition that, when a broker is employed to buy in a particular market, he is authorized to buy according to the usage of that market, but pointed out that Gabay v. Lloyd, 3 B. & C. 793, "is a distinct authority that the usuage at Lloyds is not such a general usage as to bind a person not acquainted with its existence." "It is not disputed," observes Mr. Justice Byles, "that the general rule of law is, that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash, the probability is that he will hand it over to his principal; but if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events it would very much diminish the chance of the principal ever receiving it; and upon that principle it has been held that the agent, as a general rule, can not receive payment in anything else but cash. Unless, therefore, there is some usage to control it, payment to the agent must be made in money." His Lordship thought that the usage relied on was the usage of a particular place, or of a particular counting-house, and therefore could not be binding without notice.

In the most recent case upon the subject, viz., Pearson v. Scott, 38 L. T. N. S. 747, no attempt was made to impugn the principle that an agent, to receive payment, must receive it in cash, but it was contended that the defendant had no express notice of agency, and that, without such express notice, he was entitled to make payment by a settlement in account between himself and the agent. In that case the plaintiffs were executors. They instructed a solicitor to sell some stock and shares. He employed the defendant, a stock and share

broker, with whom he had at the time a current account for differences upon private speculative transactions on the Stock Exchange. The defendant sold the property, paid a part of the proceeds to the solicitor, and, by the latter's directions, placed the balance to his credit in the current account. The balance was never paid to the plaintiffs. The solicitor was a member of a firm. During the transaction the firm wrote to the defendant, informing him that they had made the transfers in the name of certain of the plaintiffs. The main question for the court was whether this letter and the other circumstances put the defendant upon inquiry. Mr. Justice Fry, by whom the case was heard, having gone through the authorities, dwelt upon that of Bridges v. Garrett, L. R. 5 C. P. 451, where a fine, to which the plaintiff was entitled as lord of the manor, was paid to the deputy steward by a check drawn by the surrenderee on the surrenderee's bankers, and paid by the deputy steward into his own bank to which he owed money. There, however, the mode of receiving payment was within the agent's authority. It was also contended by the defendant in Pearson v. Scott, that this mode of payment by a settlement in account with the broker was sanctioned by the usage of the London Stock Exchange; but his Lordship, on the authority of the cases which have been already considered, held that such a usage was illegal in the absence of notice.—*Law Times.*

NOTES OF RECENT DECISIONS.

DISTRIBUTION OF ESTATES—ADVANCEMENT—POLICY PAYABLE TO CHILD.—*Rickenbacker v. Zimmerman.* Supreme Court of South Carolina, 11 Ch. L. N. 3. A policy of life insurance made payable to a child of the intestate should, in the distribution of the estate, be considered an advancement to that child of the value of the policy at the death of the intestate, the premiums paid subsequent to the first being considered, in the valuation of such policy, as advancements of so much money.

FIRE INSURANCE — CONSTRUCTION OF TERMS "ANY CHANGE IN TITLE"—"LEGAL PROCESS OR JUDICIAL DECREE."—*Loy v. Home Ins. Co.* Supreme Court of Minnesota, 7 Ins. L. J. 763. Respondent held a policy of insurance given by appellant upon her dwelling-house and other property therein, containing the following clause: "If the property be sold or transferred, or any change take place in title or possession (except by reason of the death of the insured), whether by legal process or judicial decree, or voluntarily transfer or conveyance * * * this policy shall be void." *Held*, 1. The policy was not avoided by a mortgage upon the property after the issuance of the policy. 2. The foreclosure of such mortgage by advertisement and a sale of the mortgaged premises on such foreclosure, the period for redemption not having expired and no change having taken place in the possession, did not operate as "a sale, transfer, or change in title," within the meaning of the policy, so as to defeat a recovery for a loss accruing after the foreclosure sale, and before the expiration of the time of redemption. CORNELL, J.: "In our judgment nothing short of a complete transfer of the legal title comes within the prohibition of this stipulation. The mere creation of a lien or incumbrance upon the property insured can not be regarded as affecting 'any change in title,' either in the legal sense, or according to the ordinary and popular understanding. 'In legal acceptation,' says Allen, J., in S. F. & M. Ins. Co. v. Allen, 43 N. Y. 389, 'title has respect to that which is the the subject of ownership, and is that which is the foundation of ownership; and with a change of title the right of property, the ownership, passes.' As applied to real estate, it is defined to be 'the means whereby the owner of lands or other real property has the just and legal possession and enjoyment of it;' 'the lawful cause or ground of possessing that which is ours.' Burr. Law Dict., vol. 2, p. 986. In this sense, which is also the ordinary and popular one in which the word is used, a change in title 'is a change in ownership, which carries the legal right of possession and property,'—and it is in this sense we must understand the word as having been used in this clause. Although, within the meaning of the registry laws, a mortgage of real estate is defined to be a conveyance, yet under our laws it is not deemed a conveyance in the sense of passing any estate or interest in lands, or transferring any legal title thereto. The only interest which a mortgagee acquires is a lien upon the land in the way of security, which, prior to the foreclosure of the right of redemption, is treated as personal property that goes to the administrator or executor, and not to the heirs. The legal title, with the right of possession, remains with the mortgagor until a completed foreclosure is had by sale, and the same becomes absolute by the expiration of the period of redemption. Until this time expires, the purchaser at the sale has only a chattel and equitable interest. He has no legal title to the lands, nor any conveyable estate therein. The character of his interest is the same as that of a mortgagee before foreclosure sale. Gen. Stats., p. 373, sec. 11; Ib., p. 540, sec. 11: Donnelly v. Simonton, 7 Minn. 167; Horton v. Miffitt, 14 Minn. 290. Neither is a foreclosure by advertisement 'legal process,' or a 'judicial decree.' The proceedings in this kind of a foreclosure are carried on wholly outside of court, and without the aid of its process or decree. It is obvious, then, that neither the giving of the mortgage nor the sale of the premises on foreclosure, the time for redemption not having expired, effected any change in title or possession, in respect to the property insured, and did not therefore avoid the policy."

CORPORATIONS — LIABILITY OF STOCKHOLDERS — SURETYSHIP — DISCHARGE.—*Hanson v. Donkersley*, Supreme Court of Michigan, 6 Rep. 368. The liability of a stockholder for labor done for the corporation is not primary as is that of a principal, but is contingent as is that of a surety; therefore, where the debtor accepts the note of the corporation, thereby extending the time of the payment of his claim, the liability of the stockholder is extinguished. The case was this: The Morgan Iron Co. owed Hanson for labor and he took its note, thereby extending the time of payment. He afterwards recovered a judgment on the note, and execution being returned unsatisfied, he brought this action against D as a stockholder, under Comp. L. § 2852, which imposes upon stockholders an individual liability for labor done for the corporation, and allows it to be enforced after return of execution unsatisfied, or after the corporation has been declared bankrupt. The court below instructed the jury that, in suing the company on the note, the plaintiff treated the note as payment of the original claim, and he was thereby precluded from recovering against the stockholders and directed a verdict for defendant. CAMPBELL, J. This case is certainly not free from difficulty. But it seems to me that the liability of the individual members of corporations for their debts, under the statute upon which this suit was brought, can not, in any just sense, be called a primary liability. The debts which

they are called on to pay are in fact—as they are expressly regarded in the Constitution—debts of the corporation. The statute is clear that the private parties shall not be called upon unless the corporation has failed to pay and legal remedies are exhausted, either by unsatisfied execution or by bankruptcy legally adjudged. The right of recovering contribution by legal action is only given where the payment made by the suing party is compulsory. He has no right to make payment without necessity, and, if he does so, he must seek redress in some other way. Comp. L. § 2852. The corporation is in law a different person from any of its members. A promise by a stockholder to pay a corporation debt is in every sense a promise to pay the debt of another. The case can not be different merely because the obligation is statutory. It may be that the statute could be so framed as to create a joint or a joint and several responsicility which could be legislated into a primary obligation. But where the corporation is not put into such relations, and the stockholder can not be called on until the remedy against the corporation has been tried and exhausted, it is entirely plain that they are not both original debtors, and that one is only collaterally liable, and is therefore in law a mere surety. It is still plainer where, as here, he has no right to pay in the first instance. The Constitution, by making stockholders "individually liable" for labor debts, does not thereby necessarily make them primarily liable. Bank corporators are made "individually liable" for bank debts contracted during their connection with the banks. Originally this was unlimited. Now it is limited. It would be impossible to regard this limited responsibility as a primary debt of the stockholders. It requires peculiar legislation to reach such cases at law at all. If the Constitution could be regarded as making them primary debtors, the remedy could not be enforced except in equity, unless in very peculiar cases, if it could be at all. Here the plaintiff sued expressly under a statute which treats the stockholder in all respects as a several surety, and he must, I think, be so treated in determining his responsibility. It can not be denied that if defendant is a surety, he was discharged from the debt for labor by taking the corporate note and giving time. In my view of the case no other question arises, and the judgment should be affirmed. MARSTON, J., dissented. He thought the stockholder primarily liable as a principal for all labor performed for the corporation; the liability was not in any sense contingent. 33 Mich. 261; 14 Cal. 265; 34 Ib. 504; 39 Ib. 646; 2 Denio, 119; 57 Barb. 484. Judgment affirmed.

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1878.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

FORFEITED RECONIZANCE.—An action upon a forfeited recognizance can be commenced only after the adjournment of the court at which the forfeiture is taken. Opinion by BREWER, J. Reversed. All the justices concurring.—*Moorehead v. State.*

CHATTEL EXEMPTION — MEANING OF "FARMING UTENSIL." — A McCormick Advance Reaper and Mower" is a "farming utensil." within the meaning of subdivision 6 of section 3 of the act relating to exemptions (Gen. Stats. 474), and in the hands of a farmer who is the head of a family and has less than $300 worth of farming implements, it is exempt from an execution issued on a judgment rendered on a promissory note given for the purchase money of such reaper and mower. Opinion by VALENTINE, J. Affirmed. All the justices concurring.—*Voorhees v. Patterson.*

ASSAULT— UNAUTHORIZED PAPERS WITH JURY.—1. If one deliberately points and cocks a loaded pistol at another, who is a mere trespasser upon his lands, within a distance which the pistol will carry, and compels such trespasser, through fear of personal violence from the deadly weapon aimed at him, to leave the premises, he is guilty of an assault. 2. If the jury, in a prosecution for an assault, carry with them on retiring to consider of their verdict a paper having writing thereon, which is folded accidentally with the instructions in the case, and it is not shown that such unauthorized and detached paper has produced any improper influence on the jury, nor is it apparent from its contents that it could have influenced the finding of the jury, nor prejudiced the rights of the defendant: *Held*, not error for the district court to overrule a motion for a new trial based upon the reception and perusal of the paper by the jury. Opinion by HORTON, C. J. Affirmed. All the justices concurring.—*State v. Taylor.*

OFFICER'S RETURN—AMENDMENT.—An officer's return on a writ is, to say the least, as against him *prima facie* correct, and he should not be allowed to amend it until he makes it clear that there is error in it, especially when the effect of the amendment is to diminish his own liability, and more especially when the party in whose favor the return was made, resting upon the faith of such return, would suffer loss by the amendment. 2. An officer is presumed to follow the law and obey the orders of the court, and this presumption will often turn the scale in a matter of conflicting testimony. Opinion by BREWER, J. Affirmed. Valentine, J., concurring: Horton, C. J., not sitting, having been of counsel in the case.—*Smith v. Martin.*

PLEADING—COMMON COUNTS.—1. After full performance by the plaintiff of the terms of an express contract, and when nothing remains unexecuted but the defendant's obligation to pay, the former may frame his cause of action upon the express stipulation of the contract, or he may rely upon the implied promise to make such payment, and to that end may resort to a petition identical with the ancient common counts. 2. In the latter case, notwithstanding the petition presents but a claim for the value of the work done, resort may be had to the contract as conclusive evidence of such value. 3. So also if changes are made by mutual consent from the original plan, the contract controls so far as it can be traced. Opinion by BREWER, J. Reversed. All the justices concurring.—*Enslie v. City of Leavenworth.*

EVIDENCE—IRREGULARITY.—1. In a criminal prosecution, where a letter, previously written and sent by the defendant to his wife, is not in the custody or control of either the defendant or his wife, nor in the custody or control of any agent or representative of either, but is in the custody and control of a third person who is the prosecuting witness in the case, such letter may be used as evidence in the case by the prosecution against the defendant. 2. In a criminal prosecution, where the court charges the jury in writing, but inadvertently fails for fifteen days to sign some of the instructions embodied in the charge, and fails to file the same among the papers in the case, but puts them in a safe place, and fifteen days afterwards produces them for the defendant to copy into a bill of exceptions, and the defendant so copies them into said bill of exceptions, and the bill is then allowed and signed by the judge, and the defendant then brings the case with said bill of exceptions to this court: *Held*, that al-

though it was wrong for the court to neglect for fifteen days to file said instructions among the papers in the case, yet that neither that nor the failure of the judge to sign such instructions for that length of time was a fatal error under the circumstances. Opinion by VALENTINE, J. Affirmed. All the justices concurring.—*State v. Buffington.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

April Term, 1878.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Associate Justices.

EJECTMENT—ADVERSE POSSESSION—WHEN SUIT MUST BE BROUGHT AFTER REMOVAL OF DISABILITY.—This was an action of ejectment. Judgment for defendant, and plaintiff brings his writ of error. On trial defendant admitted plaintiff had good paper title, and to defeat a recovery relied solely on statute of limitations. Defendant's adverse possession began January 1st, 1865. Plaintiff at that time was a minor, and became of age January 10th, 1870. Suit instituted October 18, 1875. Whether on facts stated, plaintiff was barred by statute of limitations, is the only question presented by the record. The first section of the statute of limitations (C. 191, Gen. Stat.) provides that all actions for recovery of lands, etc., shall be brought within ten years after right accrues, and the fourth section provides that persons laboring under the disabilities therein named (infancy being one) when cause of action accrues, may bring such action *after the time so limited*, and within three years after the disability is removed: provided, no action shall be maintained after twenty-four years after cause of action accrued. *Held*, the fourth section must be construed in connection with the first; and while the language employed is not as full and precise as it might be, the true meaning may fairly be declared to be, that when a right of action accrues to any person laboring under the disabilities mentioned, the period during which such disabilities continue, though *more than ten years*, shall not constitute a bar; but such persons may, within three years after removal of disability, and within twenty-four years after cause of action accrued, bring suit. If disability has existed for a period of less than ten years, such person must institute suit within three years after removal of disability, unless said three years, together with the period of such disability, are less than ten years; in which event such person is entitled to unexpired portion of ten years. When a party has the three years given by the fourth section, and the whole period of ten years given by the first section, the right of action is barred. In other words, when ten years have elapsed since the right of action accrued, and three of those years have been free from disability, the right of entry is barred. A like construction has been given to a similar statute in New York. Smith v. Burtis, 9 Johns. 180; Jackson v. Johnson, 5 Cowen, 93 and 94; Wilson v. Betts, 4 Denio, 208-9. Affirmed. Opinion by HOUGH, J.—*Gray v. Yates.*

EJECTMENT PROPER REMEDY FOR PRETERMITTED HEIRS TO RECOVER SHARES OF ANCESTOR'S ESTATE—CLAIM FOR IMPROVEMENTS BY ADVERSE OCCUPANT NOT ALLOWED UNDER A GENERAL DENIAL.—Ejectment instituted in 1872 and judgment for plaintiffs. Answer of defendants was a general denial. Plaintiffs claimed as pretermitted heirs of their father, Thos. McCracken, deceased. Defendant claimed under clause of last will of said Thomas, giving him the land in controversy, to be his absolute property after death of testator's wife, conditioned that defendant should support testator's son Miles, during his natural life. Testator died in 1859, and his widow in 1870. Defendant had lived on the land some years prior to his father's death, and widow lived on farm till her death. Defendant took care of his parents in their lifetime, and of his brother Miles till his death. Defendant offered testimony, which was excluded, showing that at death of father each of plaintiffs had received some property from his estate, and that after death of father the defendant had made valuable improvements on the land to amount to $1,500. *Held*, 1. The evidence relating to advancements made to heirs and improvements made by defendant was inadmissible under the general issue, and was properly excluded. To be made available in this action, for any purpose, these facts should have been pleaded. 2. As defendant was in possession under his father until his death, and as he claimed title under the will after his death, he had no possession which could be considered adverse to plaintiffs until after death of his mother in 1870. 3. It is conceded plaintiffs are pretermitted heirs, but it is urged they can not maintain ejectment, but must proceed under the 47th section of statute of wills, or by bill in equity for contribution. There is no fixed rule in this state on this subject. Ejectment has been maintained by pretermitted heirs for shares of land of which their father died seized, in McCourtney v. Mathes, 47 Mo. 533, and Pounds v. Dale, 48 Mo. 270. The remedy afforded by the 47th section would be appropriate, perhaps, in all cases, but it is not apparent why, under certain circumstances, ejectment, partition or a bill in equity for contribution might not also be resorted to. See Hill v. Martin, 29 Mo. 78; Wetherall v. Harris, 51 Mo. 65; Schneider v. Koester, 54 Mo. 500. The present case was an ordinary action of ejectment between tenants in common. Petition was in usual form and answer a simple denial. The only question to be tried was legal rights of plaintiffs to be admitted to joint occupancy with defendants of the land in dispute. There was no question of advancement, or improvements in the case. Defendant may recover for his improvements, under provisions of statute regulating ejectment. Affirmed. Opinion by HOUGH, J.—*McCracken v. McCracken.*

PROMISSORY NOTE—CONTEMPORANEOUS PAROL AGREEMENT—UNSETTLED PARTNERSHIP ACCOUNT CAN NOT BE SET-OFF BY ONE PARTNER IN ACTION ON HIS NOTE.—This was an action on a promissory note against defendants as makers. Defendants answered, jointly setting out that prior to the time of the making of the note, plaintiff and the defendant (Shaw) entered into a co-partnership, and that plaintiff, to start the business, advanced to the defendant (Shaw) the sum for which the note was given, which defendant, with large sums of his own, paid out in the partnership business, and that it was understood that said sum should be left with said defendant as a permanent fund for said partnership, until it was finally settled Answer further averred that, on the day of the date of said note, plaintiff requested defendant (Shaw) to execute said note as a memorandum of the amount plaintiff had advanced, and that said note was executed at that time, not as an evidence of *absolute* indebtedness of defendant (Shaw), but as evidence of a *contingent* indebtedness, in event the said co-partnership should turn out prosperously; that the partnership was disastrous and unprofitable, and there had never been any settlement of the same; that after the execution of said note, defendant (Cranchler), at the request of plaintiff, signed the same as security, in the event that there should be anything coming to plaintiff on a final

settlement between him and defendant (Shaw), and plaintiff was to hold the note simply and solely as security for the amount in the event aforesaid; that defendant (Shaw) had paid $700 more than his share of losses of the firm; that plaintiff was not entitled to recover on said note until the settlement of the co-partnership, and asked that the $700 be set-off against the note. Defense was stricken out, on motion, and judgment for plaintiff for the amount of the note and interest. Defendants appeal. *Held*, (1.) The note sued on was an absolute and unconditional promise to pay the sum of money therein specified, and defendants could not be heard to allege that, by a prior or contemporaneous oral agreement, the note was, in a certain contingency, not to be paid. To permit defendants to show a contemporaneous parol agreement that the note was only to be paid in event the affairs of the co-partnership should prove to be prosperous, would be to violate the well-established rule that parol evidence is inadmissible to vary or contradict the terms of a written instrument. Smith v. Thomas, 29 Mo. 307; Bunce v. Beck, 43 Mo. 266. It is conceded that where a part only of an entire contract is reduced to writing, the remainder may be proven by parol. Life Association v. Cravens, 60 Mo. 388. But in all such cases the parol contract must be consistent with, and not contradictory of, the written one. Bunce v. Beck, *supra*. Here defendants seek to contradict the writing, and to convert an absolute promise into a conditional one. (2.) Nor can the note in suit be treated as an *escrow*. In order to give it such effect, delivery must be made to a third person, and not to payee. Massman v. Holscher, 49 Mo. 87; Henshaw v. Dutton, 59 Mo. 139. (3.) An alleged indebtedness of a partner to his co-partner upon a settlement of co-partnership affairs, can not be pleaded as a set-off or counterclaim. Leabo v. Renshaw, 61 Mo. 292. One partner can not be said to be indebted to his co-partner, on partnership account, until there has been a settlement of co-partnership affairs. Fenney v. Turner, 10 Mo. 207. (4.) Neither insolvency of plaintiff, nor any other ground for equitable relief, was alleged, and defendant (Shaw) neither stated nor prayed an account of co-partnership affairs, so as to warrant the court below in depriving plaintiff of his right to a judgment, until such rights could be ascertained and settled. Pope v. Solsman, 35 Mo. 362. Besides, the answer was a joint one, and defendant (Cranchler) had no interest in co-partnership of plaintiff, and his co-defendant (Shaw). Affirmed. Opinion by HOUGH, J.—*Jones v. Shaw.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

[Filed at Springfield, July 24, 1878..]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER.
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

CHATTEL MORTGAGE—ACKNOWLEDGMENT—STATUTORY REQUIREMENT—ENTRY BY JUSTICE. — The facts of this case are sufficiently stated in the following abstract of the very full opinion by WALKER, J.: "This record presents the question whether the omission of a justice of the peace, in taking the acknowledgment of a chattel mortgage, to make a memorandum of the property mortgaged in his docket renders the mortgage invalid as to other lien-holders. The statute provides that such instruments shall be acknowledged before a justice of the peace, etc. It also provides that if made by a resident of this state, the justice shall enter on his docket a memorandum of the acknowledgment, and the certificate is required to state that the instrument was acknowledged and 'entered by me.' The fourth section provides that when the instrument is acknowledged as therein provided, it may be admitted to record, etc. Is, then, the entry of this memorandum in the justice's docket a part of the acknowledgment, or if not, is it an essential requirement of the statute. The form of the justice's certificate in which he says 'and entered by me,' would seem to be conclusive that the general assembly intended the entry to constitute an essential part of the acknowledgment. This enactment was intended to provide a means of permitting the mortgagor to retain possession of the property. * * * We presume the general assembly intended to protect third persons from the ready means such possession by the mortgagor afforded him for perpetrating frauds, by selling or pledging the property. Hence, they endeavored to afford ample facilities to acquire notice of any incumbrances that might exist. * * * To hold that the entry in a justice's docket is not essential would be a virtual refusal of the requirement. We are, therefore, of the opinion that appellee's mortgage was invalid as to appellant's claim." Reversed.—*Koplin v. Anderson.*

ADMINISTRATOR'S SALE — BILL TO SET ASIDE — DUTY OF ADMINISTRATOR TO BE PRESENT—LACHES OF COMPLAINT.—This was a bill in equity to set aside a sale of a certain piece of land made by an administrator of an estate. On the first hearing of the cause, the court decreed that the sale should be set aside, which was reversed by this court on appeal. 77 Ill. 47. In the original bill the only objection urged against the sale was that the administrator entered into an unlawful combination with two persons who attended the sale, which prevented competition in bidding; but after the cause was remanded, the bill was amended, and complainant set up as a further ground of relief that the sale was made in the absence of an administrator by an agent. CRAIG, J., says: "The law is well settled that the authority given an administrator to make sale of lands to pay debts is a personal trust which the administrator has no power to delegate to another. He has the right to employ any auctioneer to make the sale, but it is his duty to be present and direct, superintend and control the sale. 72 Ill. 282; 40 Ill. 368. Had the objection now urged been made within a reasonable time, it might have been regarded with more favor; but the sale was reported to the court, approved, and the administrator executed a deed conveying the premises to the purchaser, no objection having been made by complainant. The sale was made as early as 1861, but the complainant made no objection to it until 1869, when he filed the original bill; and even then he does not attack the sale for the reason that the administrator was not present. No objection of this character is heard until 1876, when the bill is amended. A delay of fifteen years after the sale was made and confirmed before relief is asked of a court of equity is such inexcusable *laches* as must condemn complainant's claim. See 23 Ill. 503." Affirmed.—*Kellogg v. Wilson.*

ORDINANCE LICENSING PACKING HOUSES—POWER OF POLICE RESTRAINT OUTSIDE CITY LIMITS.—The city of Chicago adopted an ordinance prohibiting any person, company or corporation within the city, or within a mile of the city limits, from engaging in the business of slaughtering animals for food, or packing them for market, or rendering the offal, bones, etc., of any dead animal matter, etc., * * * until

they shall have obtained a license therefor. The case was tried in the court below on an appeal from the justice of the peace on a stipulation as to the facts. It was agreed that defendant was a corporation, organized under the laws of the state, and when the suit was instituted against the company it was carrying on the kind of business mentioned in the ordinance. Its factory was in Cook county, outside of the city limits, and within the town of Lake in that county, and it had then a license from the town of Lake to carry on the kind of business it was engaged in, but had no license from the city of Chicago. The court below rendered judgment against defendants, and they appeal to this court, and urge in favor of a reversal that, for various reasons, the city had no power to pass or enforce the ordinance. WALKER, J., who delivered the opinion, after a long and careful discussion of the questions, viz.: 1. Whether the general assembly had granted the power to the city of Chicago to pass an ordinance of such a character; 2. Whether the power was also granted to exercise police restraint outside of the city limits and within another municipality (citing 50 Ill. 69; 13 Ill. 554; 46 Ill, 392), concludes; "We must conclude that the general assembly, rather than subject one large city to such hazards from smaller municipalities in their immediate vicinity, would have repealed the charter of the latter, of at least curtailed their power. What in the open and thinly settled country would not be obnoxious as a nuisance, would in the heart of a city be a terrible nuisance. Persons then desiring to engage in or near to cities must submit to have their pursuits limited and contracted. Whilst trade, manufactures and commerce have large claims on the laws for protection, theirs is not the only nor have they the highest claims. * * * To accomplish this purpose (protect health and lives), the power was conferred upon cities and villages to regulate these establishments for the distance of one mile beyond their corporate limits, even if that should lap over and embrace a portion of territory embraced in the boundaries of another municipality." Affirmed.—*Chicago Packing Co. v. City of Chicago.*

BILL TO REMOVE CLOUD ON TITLE — POWER OF ADMINISTRATOR TO MAINTAIN SUIT.—This was a bill in equity brought by the appellant as administrator of an estate to remove a cloud from the title, and to recover possession of certain lands. The answer denied that the complainant as administrator had any interest in or power over the real estate in question, and alleged other defenses. The court below dismissed the bill, and complainant appeals. SHELDON, J., says: "If for no other reason we think the decree of dismissal of the bill must be sustained upon the ground of the inability of an administrator to maintain a bill of this character. The administrator is the sole representative of the personal estate, but not of the real property. This court has decided that an administrator takes neither an estate, title or interest in the realty, and that he can not support any possessory or real action, etc. See 16 Ill. 177; 17 Ill. 135; 31 Ill. 379; 39 Ill. 402; 51 Ill. 390; 70 Ill. 399; 53 Ill. 186. It is true that in the latter case, which was a bill by an administrator of a like character with this, this court said that the bill was obnoxious to a general demurrer on the ground above, but as the bill has never been fully answered and an issue made up thereon, the cause was properly heard on its merits. That case is not to be understood as deciding that an answer is a waiver of such matter as might have been objected to by demurrer. Where an objection, as to the jurisdiction of the court, that there was a remedy at law had been made for the first time at the hearing, it has been held that the objection came too late. 4 Cow. 727; 2 Paige, 503. We understand that the case of 53 Ill. 186, was one where the objection was made at the hearing or in this court. In the present case the answer expressly insists on the want of interest in the administrator." Affirmed.—*Bryan v. Duncan.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

August Term, 1878.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, }
" WM. P. LYON, } Associate Justices.
" DAVID TAYLOR, }
" HARLOW S. ORTON, }

IN AN ACTION BY THE INDORSER OF A BILL OF EXCHANGE, who had been compelled to pay the same, the drawer and acceptor can not defend on the ground that the bill was given and accepted on an unfulfilled *parol* condition, as that the payee would surrender a note held by him against a third person. Opinion by COLE, J.—*Foster v. Clifford.*

PRACTICE — JUDGMENT CAN NOT BE SET ASIDE AFTER TERM—NEW TRIAL.—1. It is the settled law of this state that the circuit court of this state can not set aside its own valid judgment after the term at which it is entered, except to correct clerical errors, or under the provisions of section 38, ch. 125, Rev. Stats. 1858; and the rule is not affected by the fact that the motion to set aside was made during such term. 2. It seems that the question whether a new trial can be granted where a judgment to set aside after the term under the provisions of said sec. 38, is still an open one in this court, notwithstanding a dictum in Scheer v. Keown, 34 Wis. 349. 3. A motion for a new trial on the ground that the verdict was contrary to law and evidence, and for newly-discovered evidence is not an application under said sec. 38. 4. After entry of judgment, a motion at the same term to set aside the verdict and grant a new trial should not be entertained unless joined with a motion to vacate the judgment. 5. In case of relief sought under sec. 38, not only the motion but the order to vacate must be made within the year allowed by the statute. Opinion by TAYLOR, J.—*Whitney v. Karner.*

PRACTICE—CONSOLIDATION OF ACTIONS. — 1. The statute respecting the consolidation of actions (sec. 42, ch. 125, Rev. Stats. 1868), provides for such consolidation only "when the actions might have been joined." 2. An action against a railroad company for a trespass to lands in building or maintaining its road thereon, without license or condemnation of the land, can not be joined with a proceeding by the company to condemn the land under ch. 119 of 1872; and an appeal to the circuit court in the latter proceeding can not be consolidated with such an action for trespass pending in the same court. 3. It is discretionary with the court in all cases to refuse a consolidation of actions. 4. An order refusing to stay proceedings in the trespass action until trial of the appeal in the condemnatiou proceeding, is in the discretion of the court, and not appealable. Opinion by ORTON, J.—*Blesch v. C. & N. W. R. R.*

CORPORATIONS — DUTY OF TO KEEP ITS PRINCIPAL PLACE OF BUSINESS IN STATE WHERE CREATED —FORFEITURE—QUO WARRANTO.—1. The statutes of this state relating to the levy of attachment or execution upon shares of stockholders in corporations, to proceedings by or against corporations, and to the exercise of the visitorial powers of the state over them, as well as the act regulating the duties of the railroad

commissioner and the general act concerning railroad corporations, under which the defendant was organized, and other statutes, require, at least by necessary implication, that the principal place of business, the records, and the residence of the principal officers of private corporations created by this state, shall be within the state, at least so far as may be necessary to give full effect to those statutes; and the charter of such a corporation may be adjudged forfeited for continued neglect of such duty, under ch. 283 of 1874. 2. Independently of statutes, it is the duty of a private corporation to keep its principal place of business, its records and the residence of its officers so located as to render it accessible to the process and to the exercise of the visitorial power of the state by which it is created; and a forfeitute may be adjudged for violation of this common-law obligation. 3. An information showing that the principal office of the defendant company is in the city of New York; that its books and records have always been kept in that city; that none of its principal officers reside in this state; and that by reason of these facts it has been impossible to enforce an attachment against the shares of stockholders in said company in actions brought in courts of this state, in accordance with the laws thereof: *Held*, on demurrer, to show sufficient ground for adjudging a forfeiture of the company's charter. 4. This court takes original jurisdiction of an information in the nature of a *quo warranto*, filed, by leave of the court, by the attorney-general in behalf of the state, to annul the charter of a railroad company upon the grounds above stated. 5. Persons injured by the alleged misconduct of the company, in specific instances stated in the information, need not be joined as plaintiffs or made relators in this action. 6. The several particulars of the defendant's abuse of its franchises alleged in the information (its having its principal office in another state, its keeping its records there, and the fact that its officers reside there), are not distinct causes of action; but even the joinder of distinct grounds of forfeiture in such an information would not be demurrable. Opinion by ORTON, J.—*State v. M. L. & N. R. R.*

DAMAGES—WARRANTY—EVIDENCE—RESCISSION OF CONTRACT.—1. Where one of the questions in issue was as to the defendant's damage from an alleged breach of warranty in the sale of oxen, it was not error to rule out a direct question put to him as a witness in his own behalf, calling for his opinion as to the amount of such damage. 2. The plaintiff in such action, on his cross-examination by defendant, might properly be asked whether the oxen were in as good a condition at the time of the sale as at the time of the trial, especially when he had introduced evidence of their value based upon their appearance at the latter time; but error in ruling out the question was cured by the witness afterwards testifying to the same point upon direct examination. 3. To constitute a rescission of a contract of sale, for breach of warranty, the vendee's offer to return the property should be unconditional, and should assign the breach of warranty as the ground thereof. 4. The warranty claimed in a sale of oxen was, that they were sound and true, and in all respects suitable for defendant's purposes. There was proof that some time after the purchase that the vendee wrote to the vendor that he was so much disappointed in the oxen that he would not pay the note he had given the vendor for $118, the purchase price; that they were not worth $75; and that the vendor might take them away, upon which vendee would pay for the use of them, or might leave them, in which case he would pay $75 for them. *Held*, that there was no error in refusing to instruct the jury upon this evidence, as matter of law, that defendant had rescinded the contract. 5. It is generally a question of fact for the jury whether an offer to return goods sold and rescind the contract is made within a reasonable time. 6. A continued use of the whole or a part of the property sold, after an alleged offer to rescind, is inconsistent with the claim to have rescinded, or at least strong evidence against it. 7. In assessing damages for a breach of warranty, the jury are not bound to accept the amount estimated by any of the witnesses, nor the average of the amounts estimated by different witnesses, but must exercise their own judgment upon all the facts in evidence, including the opinions of witnesses as to the difference between the actual value of the article and what it would have been worth if as warranted. 8. A judgment can not be reversed, therefore, on the ground that the verdict was not sustained by the evidence in respect to the amount allowed for breach of warranty, merely because such amount does not conform to either the estimate of any witness, or the average of all the estimates; especially where several warranties were alleged, and it does not appear which of them the jury found to have been given and broken. Opinion by TAYLOR, J.—*Churchill v. Price.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1878.

HON. WILLIAM E. NIBLACK, Chief Justice.
" HORACE P. BIDDLE,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS, } Associate Justices.

PLEADING—EXHIBITS.—Exhibits which are not the foundation of the action or defense do not become part of a pleading by being filed with it, and the contents of such exhibits can not be considered to supply any omission in, or to aid in the construction of the averments in the pleading. Opinion by NIBLACK, C. J.—*Moore v. Cline.*

COMPLAINT FOR NEW TRIAL—PLEADING.—A complaint for a new trial on the ground of newly-discovered evidence must set out all the evidence given upon the former trial; and where such complaint shows on its face that it does not contain all the evidence, a demurrer filed thereto does not admit to be true an allegation that such complaint does contain all the evidence. A demurrer admits only such facts as are well pleaded. Opinion by WORDEN, J.—*Trustees of the Indiana State Spiritual Association v. Reynolds.*

SHERIFF'S SALE — NON-PAYMENT OF PURCHASE-MONEY.—A *venditione exponas* can only issue where property levied on remains unsold. In this case, the sheriff's return to the previous execution was as follows: "The real estate levied on (being the land above described) sold to John G. Shackleford, April 6, 1872, for $130; purchase-money not paid." A fair construction of the return shows that the land remained unsold when the return was made. The language was equivalent to saying that the land was "bid off by John G. Shackleford for $130: purchase-money not paid." The plain inference is that the title of the land had not then passed, and that hence there had been no valid sale. No valid sale being shown by the return, it followed that the land remained unsold, and that a *venditione exponas* was properly issued. Opinion by NIBLACK, C. J.—*Dawson v. Jackson.*

QUERIES AND ANSWERS.

QUERIES.

65. A QUESTION ON THE LAW OF HOMESTEADS.—A owns the N. 200 feet of Blk. 34, the same being in one inclosure. The house stands on the E. 125 feet, the barn on the W. 75 feet. The premises are occupied as a homestead by A. In December, 1874, he (wife not joining) conveyed to B, but B did not put the deed on record until October, 1875. In the meantime A, being in want of money, in May, 1875, borrows $2,000 of C, and gives a mortgage, in which his wife joins on the E. 125 feet of the N. 200 feet of Blk. 34. Then A and wife die, leaving them surviving several children, two of whom are minors. B, in October, 1877, conveys to D, one of the children, and who resides with the family on the homestead. Now, supposing the conveyances from A to B and B to D should be declared void, this would still leave the title in *D* and the minor heirs of A. The question is: Can D set up homestead exemption against E (a judgment creditor who has filed a creditor's bill asking that the last mentioned conveyances be set aside), as to the W. 75 feet of the N. 200 feet of said Blk, that being the part on which homestead exemptions have never been waived?

M.

ANSWERS.

No. 56.

[7 Cent. L. J. 199.]

In regard to the amount of diligence required in making demand of payment and giving notice of dishonor in order to hold the indorsers of a note indorsed after maturity, see 6 Ohio, 55, 66; Lanborn v. Southard, 25 Maine, 409; Rice v. Werson, 11 Metc. 400; Bank of Alexandria v. Swann, 1 Pet. 33, 47; Bank of Columbia v. Lawrence, 1 Pet. 578, 584. Does knowledge of maker's insolvency excuse demand and notice, in order to hold the indorser? Pon's Executors v. Kelley, 2 Haywood, 45; Escale v. Sowerby, 11 East. 114; Gower v. Moore, 25 Maine, 16; Byles on Bills, 158; Howe v. Bowers, 16 East. 112; Nicholson v. Gonthwitt, 2 H. Bl. 609; Russell v. Langstaff, Douglas, 497; May v. Coffin, 4 Mass. 341; Juniata Bank v. Hale, 16 S. & R. 167; Byles on Bills, 234, 236.

H. P. G.

Brunswick, Mo.

No. 60.

[7 Cent. L. J. 219.]

A statutory exemption cannot be waived by an executory contract, and such a waiver will not be enforced. "The principle is that the exemption created by the statute is as much for the benefit of the family as for himself, and for that reason he can not by an executory contract waive the provisions of the law made for their support and maintenance." Recht v. Kelly, 82 Ill. 147; Phelps v. Phelps, 72 Ill. 548; Curtis v. O'Brien, 20 Ia. 376; Maxwell v. Reed, 7 Wis. 583; Kneetle v. O'Brien, 22 N. Y. 249.

G. L. D.

Bushnell, Ill.

BOOK NOTICE.

REPORTS OF CASES ARGUED AND DETERMINED in the Supreme Court of Tennessee. Edited by JERE BAXTER. Vol. III. Nashville, Tenn., 1878.

The cases reported in this volume were decided at the December terms of 1873 and 1874, of the Supreme Court of Tennessee. The volume contains 576 pages, and is well printed and bound. The opinions are all short—singularly so in this day of lengthy judgments—averaging a little over two pages each in length. We have not been able to find among them any cases of general importance or interest.

There is, however, one amusing case in this volume. In *Hancock v. Elam*, p. 33, a verdict was set aside on account of the tender regard for a juror's stomach entertained by the supreme court. On the trial of the case, the jury having been out from eleven till one o'clock, returned into court and announced that they could not agree. Upon this the judge, who had no doubt already dined, ordered the sheriff to lock them up until they agreed, without, as the appellate court very compassionately remarks, "allowing them to have their dinners before being locked up." The verdict was set aside on account of this piece of tyranny on the part of this judicial gourmand. "The jury might very well understand," say the court, "that they were requested either to agree or to submit to indefinite confinement and starvation. They were ordered to be locked up until they should agree. They did agree in the course of several hours, but whether their disagreement was harmonised, under free patient investigation and deliberation, or under the apprehension of prolonged confinement and starvation, we have no means of determining. We can see, however, that under the influence of such an arbitrary order, jurors may have yielded their convictions, in order to avoid the threatened consequence of continued disagreement." And so the plaintiff lost her judgment of $228, which the jury had found to be the value of work and labor performed by her for the defendant, and for all we can tell, waits for *her* dinner still. It is a pleasure to think that the poet's famous line:

"And wretches hang that jurymen may dine,"

can never be applied to the State of Tennessee, whose highest tribunal can discern with so quick an eye, and can visit with such enormous penalties, any attempt, on the part of its officials, to interfere with the right of the citizen to have his mid-day meal promptly at noon. A London alderman, just rising from a dinner of whitebait, could deliver the judgment in this case with becoming unction.

NOTES.

LORD CHANCELLOR CAIRNS has received the title of Viscount Garmoyle. —— Mr. Richard H. Dana, Jr., will reside for the next two years in Paris, and will devote most of his time to the completion of a work on international law.——The members of the Executive Committee, and of the Committee on Grievances, of the Illinois State Bar Association, are invited to meet at Springfield, October 10th, at ten A. M., for executive and committee action. The members of the Executive Committee are: The President and Secretary, *ex officio;* 1st. Dist. J. M. Rountree. Nashville; 2d, S. M. Moulton, Shelbyville; 3d, C. A. Roberts, Pekin; 4th, N. M. Knapp, Winchester; 5th, Charles Blanchard, Ottawa; 6th, J. G. Monahan, Chicago; 7th, J. B. Bradwell, Chicago. The members of Committee on Grievances are: 1st Circuit, Thos. H, Clark, Golconda; 2d, Wm. C. Jones, Robinson; 3d, Sam'l L. Dwight, Centralia; 4th, Wm. E. Wilson, Decatur: 5th, A. Orcudorff, Springfield; 6th. A. C. Matthews, Pittsfield; 7th. Wm. Fuller, Clinton; 8th. H. W. Wells, Peoria; 9th. S. W. Munn, Joliet; 10th. A. N. Brown, Galesburg; 11th. Stephen R. Moore, Kankakee; 12th. Jesse M. Hildrup, Chicago; 13th. L. L. Bond, Wm. Vocke, R. E. Jenkins, Chicago. The interests of the association require the attendence of the members of these committees at this meeting. The call is by order of Anthony Thornton, president, and Wm. L. Gross, secretary.